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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783.

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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INDEX

PAGE

ARGUMENT—

I—The Effect of the Department of Justice's Characterization of Petitioner's Beliefs as Primarily Political and Racial 1

II—Petitioner Was Opposed to Participation in War in Any Form Within the Meaning of the Act 6

III—The Appeal Board May Have Relied Upon the Department's Erroneous Advice That Petitioner's Claim Could Be Denied Because He Was Insincere 14

CONCLUSION 18

TABLE OF CASES

Carson v. United States, 411 F.2d 631 (5th Cir. 1969), cert. denied, 396 U.S. 865 (1969) 2, 4

Cohen v. Laird, 315 F. Supp. 1265 (D.S.C. 1970) 17

Gillette v. United States, —— U.S. ——, 39 L.W. 4305 (March 8, 1971) 2, 3, 7, 8, 11, 12, 13, 14

Kretchet v. United States, 284 F.2d 561 (8th Cir. 1960) 13, 16

Negre v. Larsen, No. 325, decided March 8, 1971 ..... 8, 13

Shepherd v. United States, 217 F.2d 942 (9th Cir. 1954) 16

Sicurella v. United States, 348 U.S. 385 (1955) 3, 8, 10, 11, 12, 14

PAGE

United States v. Bova, 300 F. Supp. 936 (E.D. Wis. 1969) 3

United States v. Englander, 271 F. Supp. 182 (S.D. N.Y. 1967) 3, 5, 6, 14, 16

United States v. French, 429 F.2d 391 (9th Cir. 1970) 4

United States v. Jakobson, 325 F.2d 409 (2d Cir. 1963), aff'd sub nom. United States v. Seeger, 380 U.S. 163 (1965) 3, 4, 5, 14, 16

United States ex rel. Lehman v. Laird, 430 F.2d 96 (4th Cir. 1970) 17

United States v. Owen, 415 F.2d 383 (8th Cir. 1969) 12, 16

United States ex rel. Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969) 17

Welsh v. United States, 398 U.S. 333 (1970) 3, 4

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ARGUMENT

I.

The Effect of the Department of Justice's Characterization of Petitioner's Beliefs as Primarily Political and Racial.

In its brief the Government acknowledges for the first time in any of the proceedings in this case that petitioner's opposition to war had "religious roots." Implicit in this acknowledgment is the concession that petitioner's conviction must be reversed if the Department of Justice recommended that the appeal board deny petitioner's conscientious objector claim because it was not based on religious training and belief within the meaning of the Act.

The Government argues, however, that the Department did not draw into question the religious nature of peti-

tioner's beliefs in its advice letter. Rather, it reasons that the Department's discussion of the "political and racial" basis of those beliefs was only intended to explain their selective aspect.

We think that the Government's assertion in this Court that the religious nature of petitioner's beliefs has never been questioned flies in the face of the record. Indeed, the very boldness with which it now concedes that petitioner's opposition to war had religious roots serves to highlight the care it took to avoid any such concession in the past. Despite its claim that petitioner's beliefs were acknowledged to be religious, nowhere in the record did the Department of Justice ever recognize either that the Nation of Islam was a religion or that petitioner's beliefs were religious. One might well ask why, if there was never any dispute as to the religious nature of petitioner's beliefs, the Department never acknowledged it until the case reached this Court? Although the advice letter does not explicitly state that petitioner's beliefs were not religious within the meaning of the Act, we think that its emphasis on their political and racial aspects coupled with the careful omission of any reference to their clearly religious source was calculated to convey that conclusion.[1]

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[1] As we pointed out in our main brief, the Government has in fact explicitly taken the position that "political" beliefs do not satisfy the "religious training and belief" clause of the Act, even though the beliefs are clearly part of the doctrines of a religion. It appears to read the Act's requirement of a "religious" belief as requiring a belief based upon ethical or moral principles. Thus, in his memorandum in opposition to the grant of certiorari in *Carson* v. *United States*, No. 398, Misc. O.T. 1969, the Solicitor General argued that a Black Muslim's opposition to war based upon the teachings of the Nation of Islam "was not based on ethical principles but on essentially political views." And in its brief in the Fifth Circuit in the same case the Government argued that the registrant's "opposition to war is based on political, sociological, and economic considerations, and not because of religious beliefs." (Brief for Appellee, p. 7). As recently as its brief in *Gillette* v.

But we do not rest our argument upon what the Department of Justice intended to advise the appeal board or even upon whether the advice letter can support the interpretation which the Government now urges. The validity of the Department's advice must be judged by what it was likely to have meant to the lay members of an appeal board in 1966. See *Sicurella* v. *United States*, 348 U.S. 385 (1955); *United States* v. *Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 163 (1965); *United States* v. *Bova*, 300 F. Supp. 936 (E.D. Wis. 1969); *United States* v. *Englander*, 271 F. Supp. 182 (S.D. N.Y. 1967).

In our main brief, we argued that the appeal board undoubtedly interpreted the Department's advice that peti-

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United States, No. 85, this Term, the Government explained that in order to satisfy the Act the beliefs of a conscientious objector must be based "on the cardinal moral tenet that it is wrong to kill for any purpose at any time" (Br. p. 25). Indeed, in its brief in opposition to certiorari in the present case, the Government left open the argument that petitioner's "political and racial" beliefs might not come within the "religious training and belief" clause even though they were based upon religious doctrine. It argued that the *Welsh* decision does not:

> "read out of the exemption provision (50 U.S.C. App. § 456(j)) the requirement that a conscientious objection to war must be founded on 'religious training and belief.' 398 U.S. at 338-340. A registrant is still denied exempt status if his objection 'rests solely upon considerations of policy, pragmatism, or expediency' (398 U.S. at 342-343). The statutory exemption applies to persons who on moral and ethical grounds conclude it is wrong to kill a fellow human being in war; it does not extend to those who as a matter of conscience conclude on racial grounds that it is wrong to fight on behalf of white men who are viewed as oppressors" (Brief for the United States in Opposition, p. 15).

In other words, until its brief in this Court the Government has taken the position that even if petitioner was opposed to all wars, he could nevertheless be denied an exemption because his beliefs, even though rooted in religious doctrine, were not based on "moral or ethical grounds."

tioner's opposition to war was based upon beliefs which were "primarily political and racial" as placing petitioner within the category of registrants who were not entitled to a conscientious objector exemption because their beliefs were "essentially political, sociological or philosophical." We also pointed out that it was not until *Welsh* v. *United States*, 398 U.S. 333 (1970) that it became clear that beliefs that were based upon political or other views that were not ordinarily considered religious could nevertheless be considered "religious" within the meaning of the Act. While it is true, as the Government points out, that the Nation of Islam clearly falls within the *Seeger* definition of religion, it is not true that before *Welsh* laymen would have been likely to even entertain the notion that the unfamiliar beliefs of the Black Muslims that the Government described as "primarily political and racial" (and failed to recognize as "religious") could be considered "religious." *See United States* v. *French*, 429 F.2d 391 (9th Cir. 1970). Indeed, even the far more sophisticated judges of the Fifth Circuit concluded, on the basis of arguments and evidence similar to that contained in the Department's advice letter, that the beliefs of a Black Muslim conscientious objector "reflect an opposition to war which smacks of being essentially political, rather than religious. . . ." *Carson* v. *United States*, 411 F.2d 631, 633 (5th Cir. 1969), *cert. denied*, 396 U.S. 865 (1969).

Giving the Government the benefit of any doubt, the most than can be said for the Department's advice letter is that it was highly ambiguous with respect to the meaning of its conclusion that petitioner's beliefs were "primarily political and racial." It was at least as likely to be read by laymen as a finding that petitioner's beliefs were not religious as an explanation of why he was only opposed to certain wars. Thus, the rule requiring reversal of a

conviction in cases where the reviewing court cannot say that a draft board did not rely upon an improper reason in denying a conscientious objector exemption is applicable here. Since the appeal board might reasonably have interpreted the letter a rejecting petitioner's claim because it was not "religious," the conviction must be reversed.

The uncertainty as to what the Department was recommending in the present case is similar to the situation in *United States* v. *Jakobson, supra*, where a registrant's conviction was reversed because it was unclear whether the Department recommended rejection of his claim because he was insincere (for which there was evidence) or because his beliefs were not religious (which was erroneous). When the same ambiguity appeared in a Department recommendation in a subsequent case, the court, in words equally applicable here, commented:

> "It is the decision of the lay Appeal Board, whose members presumably read and deliberated on the recommendation, which is the critical operative fact in this case, as it was in *Jakobson*. Whatever undisclosed changes of meaning were in the mind of the Department attorney, the words he used, and the ambiguous message they appeared to convey, were flawed in a substantially identical way. Indeed, the able arguments of government counsel opposing defendant's motion for an acquittal served in a measurable degree to highlight the uncertainties and potential confusion the Department's letter could well have generated even for law-trained people familiar with the precedents. . . ." (*United States* v. *Englander*, 271 F. Supp 182, 185 (S.D. N.Y. 1967.))

We think that the Department's advice letter in the present case was equally ambiguous with respect to a

crucial element of petitioner's conscientious objector claim and, as a result, the appeal board may have rejected his claim for an improper reason. We conclude with the court in *Englander, supra*, therefore, that such a "key determination so fraught with doubt cannot be adequate ground for conviction upon a grave criminal charge" (271 F. Supp. at 185).

II.

Petitioner Was Opposed to Participation in War in Any Form Within the Meaning of the Act.

The Government agrees that the controlling question in this case is whether, on the basis of his particular religious beliefs, petitioner "can in consonance with his conscience presently envision himself engaging in a real shooting war under certain circumstances" (Gov't. Br. p. 28). It concludes, however, that the record supports the inference that "petitioner would not object to fighting tomorrow with real weapons in a defensive war on behalf of the Muslims" (*id.* at p. 27). The Government reaches this conclusion only by reading petitioner's unequivocal testimony concerning his belief in personal self-defense as indicating a willingness to engage in defensive wars on behalf of Muslims, and by attributing to him a supposed doctrine of the Nation of Islam that encouraged defensive wars even though such a doctrine is completely inconsistent with everything petitioner himself said.

The doctrines of a religion are certainly relevant in explaining the religious basis for a registrant's conscientious objections to participation in war. They are, no doubt, also relevant in helping to resolve ambiguities in a registrant's testimony concerning his religious beliefs or when he has explained his beliefs solely by referring to the teachings of his faith. Our position is, however, that where, as in

the present case, the registrant's testimony concerning his opposition to participation in war and his interpretation of the meaning of the teachings of his religion is clear and unambiguous, the arguably inconsistent doctrines of his religion cannot provide a basis in fact for the denial of a conscientious objector exemption. *See Gillette* v. *United States*, —— U.S. ——, 39 L.W. 4305, 4310 (March 8, 1971.)

But this is precisely what the Government does when it argues that petitioner "incorporated by reference" the religious writings which he testified provided the basis for his religious beliefs and then uses the alleged ambiguities in these writings as a basis in fact for the denial of his claim. It is as if a Christian conscientious objector testified that his opposition to participation in all war was based on the teachings of the Bible and the Government supported the denial of the claim on the ground that the Bible, which the registrant had "incorporated by reference," does not preclude fighting in all wars. Indeed, since there are few religions whose teachings are unambiguous in any respect, the denial of a conscientious objector claim could always be supported on the ground that the administrative agency resolved the ambiguities in religious doctrine against the registrant.

We have argued in our main brief that petitioner's own testimony and statements assert a clear and unambiguous opposition to participation in all wars except theocratic wars or wars in which he is commanded to fight by his God. We pointed out that there was no basis in fact for the conclusion of the Department of Justice, relied upon by the appeal board, that petitioner's opposition to participation in war was selective, based in part upon an objection to fighting on behalf of the United States and in part upon an objection to fighting in the Vietnam War.

The Government does not now seriously challenge that argument. Instead, it seeks to support the denial of petitioner's claim for a reason which, as far as we can determine, it raises in this Court for the first time. Thus, it argues that the teachings of petitioner's religion forbid only participation in wars of aggression, but encourage participation in defensive wars (Gov't Br. p. 20). Petitioner's willingness to participate in war, the Government now tells us, is based upon whether he considers it a "just" or "unjust" war (*ibid.*).

In view of this Court's decision in *Gillette* v. *United States*, No. 85, and *Negre* v. *Larsen*, No. 325, decided March 8, 1971, that a registrant who is willing to participate in wars of national defense and in "just" wars is not entitled to a conscientious objector exemption, it is clear why the Government now seeks to characterize petitioner's religious beliefs in such a way as to make this case applicable. But it is unnecessary for this Court to consider the position that is urged by the Government for the first time. *See Sicurella* v. *United States*, *supra*, 348 U.S. at 391-92. The issue is whether there was any evidence to sustain the denial of petitioner's claim on the basis of the Department of Justice's recommendation to the draft board. And as we have already argued, there was no such evidence. (Pet. Br. pp. 29-38)

Even if we consider the Government's new argument as having been fairly presented to the appeal board, it finds absolutely no support in the record. In its zeal to fit petitioner into the mold of the *Gillette* case, the Government has tortured the meaning of what petitioner said beyond recognition.

Indeed, the Government's new interpretation of petitioner's beliefs is so strained that it is in conflict with its own previous position. For when this case was in this

Court on petition for certiorari for the first time, the Solicitor General, in referring to the information in the FBI resume that the male members of petitioner's religion are given military instruction, commented that:

> "Petitioner and another witness [Samuel X. Saxon] both testified at the hearing on his claim of exemption that this was only training in self-defense, and *that there was no thought of actually engaging in any type of war. This testimony was never questioned.*" (Supplemental Memorandum for the United States, No. 271, O.T. 1968, p. 4; n. 3.)

Not only does the Government now question petitioner's testimony that he had "no thought of actually engaging in any type of war," but its entire case rests upon its claim that "petitioner would not object to fighting tomorrow with real weapons on behalf of the Muslims" (Gov't Br. p. 27).

The only support it finds for this argument, moreover, is in statements by petitioner and others that reflect the Muslim belief in personal self-defense. Thus, the Government relies on Samuel X. Saxon's testimony to suggest that the Muslims are opposed to aggressive wars but will fight a defensive war (Gov't Br. p. 25), despite Mr. Saxon's explicit disavowal of any such principle as part of the doctrine of the Nation of Islam (A. 39a-40a). Mr. Saxon made perfectly clear that the Muslims' belief in defending themselves was limited to defending "your life, your home, your family," with no thought of engaging in war (A. 42a).

Similarly, in the newspaper report quoting petitioner as saying that Muslims are taught "to defend ourselves when we are attacked" that the Government relies upon so heavily (Gov't Br. pp. 7, 13, 25-26, 29, 32), he was obviously referring to, and his statement is entirely consistent with, fighting in personal self-defense. At the hearing petitioner

acknowledged making the statement (A. 80a) and went on to explain that his religion taught Muslims to defend themselves against attacks only through the use of judo, karate, boxing and wrestling (A. 104a-107a).[2]

A review of the statements on the record referred to by the Government reveals absolutely nothing to show "petitioner's present willingness to engage in 'real shooting wars' . . . in defense of the Muslims." (Gov't Br. p. 29) And the Government's inference that petitioner would use "carnal weapons" is flatly contradicted in the very statements to which it refers, as well as by every other statement in the records on that subject. (A. 18a, 38a, 42a-43a, 48a, 49a, 51a, 70a-71a, 103a-107a.)

The similarity between the Government's argument here and its argument in *Sicurella* v. *United States*, 348 U.S. 385 (1955), bears mention. In *Sicurella*, the Government argued that the appeal board could have properly concluded that the willingness of the Jehovah's Witnesses to use force in defense of their "Kingdom Interests" and fellow brethren "could involve more than individual self-defense, and contemplated such mass use of force as could be nothing less than warfare." (Brief for the United States, No. 250, O.T. 1954, p. 25.) Now, the Government seeks to expand the Muslim's belief in defending themselves when they are attacked into a belief in fighting full-blown defensive wars.

But it is even harder to find support for the conclusion that Muslims are willing to fight in some wars than it was to make the same argument about the Jehovah's Witnesses. For one thing, the Muslim belief in individual self-defense is much narrower than the belief of the Jehovah's Witnesses that permits use of force to defend "Kingdom In-

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[2] It was this testimony that the Solicitor General referred to as indicating "no thought of actually engaging in any type of war." (See p. 9, *supra*.)

terests." In addition, the Muslim opposition to participation in war is based on a pacifist strain that is completely absent from the theology of the Jehovah's Witnesses. *See Sicurella* v. *United States, supra,* 348 U.S. at 390. As we have pointed out, Muslims oppose participation in war because war takes human lives and is antithetical to the ideal of peace embodied in Allah and in Islam (Pet. Br. pp. 30-31). What this Court said in *Sicurella* about the Jehovah's Witnesses' belief in defense of "Kingdom Interests" is equally applicable to the Muslim belief in self-defense:

> "[It] has neither the bark nor the bite of war as we unfortunately know it today. It is difficult for us to believe that the Congress had in mind this type of activity when it said the thrust of conscientious objection must go to 'participation in war in any form.'" (348 U.S. at 390)

And certainly the Muslim doctrine represents no more than a "[w]illingness to use force in self-defense, in defense of home and family, or in defense against immediate acts of aggressive violence toward other persons in the community" which this Court recently recognized is consistent with a conscientious objector claim. *Gillette* v. *United States, supra,* 39 L.W. at 4308.

Finally, even on the Government's own terms, the war which it envisions petitioner and the Muslims participating in is so hypothetical, abstract and remote that it cannot be considered "war" within the meaning of the Act. In essence, the Government sees petitioner fighting, at the direction of Elijah Muhammad, in a real war in defense of a Muslim nation. (Gov't Br. pp. 13, 20, 25, 27, 32). It finds support for this supposed war by reading Elijah Muhammad's statement that "[w]e do not believe this nation should

force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for" as a reservation in the opposition of Muslims to fighting in all wars. But as we pointed out in our main brief (Pet. Br. pp. 32-33), this statement can be read only as indicating that *if* Muslims are given territory they *might* fight to defend it. There is no material difference between this statement and the statement of the registrant in *United States* v. *Owen*, 415 F.2d 383, 390 (8th Cir. 1969), that *if* this country were invaded he *might* fight in its defense. The most that can be said is that the Muslims, like Owen, "oppose participating in all wars, but cannot say with complete certainty that their present convictions and existing state of mind are unalterable." *Gillette* v. *United States*, *supra*, 39 L.W. at 4309. And as this Court has said the "[u]nwillingness to deny the possibility of a change of mind, in some hypothetical future circumstances," is not inconsistent with a present unwillingness to participate in war in any form. *Ibid.*

Even a present willingness to participate in a war in defense of the Nation of Islam, however, would be virtually indistinguishable from the willingness of the Jehovah's Witnesses to fight in theocratic wars. In either case, any fighting would be only at the command of God to defend the religion and its followers against attack. It is as absurd to suggest that such an abstract religious war is in the same category and is as likely to occur as a war in which Germany, Russia or Israel is involved (Gov't Br. p. 28), as it was to suggest that the War of Armageddon in which the Jehovah's Witnesses were willing to participate was a reasonably imminent war of earthly nations.[3] Indeed, even

[3] In *Sicurella* the Government argued that in their religious writings "[t]here is a summons to Jehovah's Witnesses to be pre-

the willingness of the Jehovah's Witnesses to use "carnal weapons" at Jehovah's command has been held to be an insufficient basis for denying a conscientious objector claim. *Kretchet* v. *United States*, 284 F.2d 561, 564 (5th Cir. 1960). And as in the case of the Jehovah's Witnesses, history discloses no command to Muslims by Elijah Muhammad to participate in war in defense of Muslims in this country or elsewhere, and there appears to be no likelihood that this will ever occur (A. 101a-102a).

A willingness to participate in such a religious war, moreover, in no way depends "upon particularistic factual beliefs and policy assessments which presumably were overridden by the government that decides to commit lives and resources to a trial of arms." *Gillette* v. *United States*, *supra*, 39 L.W. at 4312. Unlike the registrants in *Gillette* and *Negre* who were only opposed to participating in the Vietnam War because of their judgments as to that particular war, the Government contends that petitioner is opposed to all wars except one in which he is called upon by Allah to defend his religion and his coreligionists against attack. No particularistic judgments of any sort are involved in the decision to participate in this war; it is not based upon political or even moral considerations. Rather, it is based simply upon a theocratic command to defend the faith.[4]

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pared to participate in a quite reasonably imminent war of Armageddon which, although occasionally referred to at certain points as a distant spiritual conflict of angels and Satan, is as persuasively referred to elsewhere as an outright war of earthly nations sanctioned by Jehovah." (Brief for the United States, *supra*, p. 30; see also pp. 29-32.)

[4] Indeed, it is difficult to see how "political and racial" considerations have anything to do with what the Government now claims to be the basis of petitioner's "selective" opposition to war. See Gov't Br. pp. 19-20. If Muslims will participate in a defensive war only at the direction of their God when they are attacked collectively, petitioner's decision whether or not to fight does not entail any "political and racial" judgments.

We think, therefore, that a supposed war in defense of the Nation of Islam cannot rationally be distinguished from the theocratic war of the Jehovah's Witnesses. The Government's distinction between Black Muslim and Jehovah's Witness conscientious objectors on the basis of whether their religious doctrines contemplate real or abstract religious wars "entangles government in difficult classifications" and creates a real "danger of unintended religious discrimination." *Gillette* v. *United States, supra;* 39 L.W. at 4311. We submit that unless petitioner's conviction is reversed, that danger will have been realized in this case.

III.

The Appeal Board May Have Relied Upon the Department's Erroneous Advice That Petitioner's Claim Could Be Denied Because He Was Insincere.

In our main brief we argued that the Government erroneously recommended to the appeal board that it could deny petitioner's conscientious objector claim on the grounds of insincerity. That the board may have correctly relied, as the Government now argues, upon a determination that his objection to war did not have the requisite generality, does not cure the effect of the erroneous advice. For when the appeal board is presented by the Department with a permissible and an impermissible ground for denying a conscientious objector claim, a conviction must be reversed when there is no way of determining upon which ground the board ruled. *Sicurella* v. *United States*, 348 U.S. 385, 392 (1955); *United States* v. *Jakobson*, 325 F.2d 409, 416 (2nd Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 163 (1965); *United States* v. *Englander*, 271 F. Supp. 182, 184 (S.D. N.Y. 1967).

The Government now appears to concede for the first time that petitioner was sincere in his conscientious objector claim. It does not argue that the appeal board could properly have denied his claim on the grounds of insincerity.[5] (Gov't Br., p. 33) Rather, it argues that the only ground that the Department tendered to the board as the basis for denying his claim was the alleged selectivity of petitioner's objections to war (*ibid.*). In the same way that it now takes the position that the Department did not advise the board to reject petitioner's claim because it was not "religious," it also takes the position that the Department did not advise the board that it could reject petitioner's claim on the grounds of insincerity. Thus, it argues that since only one reason was given to the board for the rejection of petitioner's claim, there is no occasion for this Court to consider the possibility that the board acted upon an erroneous ground.

But we have difficulty reading the Department's advice letter as asserting anything but "a firm conclusion that petitioner was insincere" (Gov't. Br. p. 33). After discussing petitioner's sincerity for three pages, the Department concluded categorically that:

> "[A] registrant has not shown overt manifestations sufficient to establish his subjective belief where, as here, his conscientious-objector claim was not asserted until military service became imminent. *Campbell* v. *United States*, 221 F.2d 454. *United States* v. *Corliss*, 280 F.2d 808, *cert. denied*, 364 U.S. 884.

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[5] It is interesting to note that in the district court the Government supported the denial of petitioner's conscientious objector claim almost entirely upon the basis of the argument that the appeal board had a "basis in fact" for a finding that petitioner was insincere (R. 448-459). The identical argument was presented on appeal in the Fifth Circuit. (Brief for Appellee, No. 24,991 pp. 29-39).

> The burden of clearly establishing his conscientious-objector claim is upon the registrant. *Swaczyk* v. *United States*, 156 F.2d 17, *cert. denied*, 329 U.S. 726. *The Department concludes that this registrant failed to sustain that burden.*" (A. 127a) (Emphasis added).

The Government would apparently have us read the Department's conclusion as to the failure of petitioner to sustain his burden of proof as relating only to the discussion of the selectivity of his objections to war contained pages earlier in the letter and not to the discussion of his failure to establish his sincerity contained in the preceding paragraph. The clear language of the letter, however, will simply not bear such a construction. *See United States* v. *Jakobson, supra*, 325 F.2d at 411-412; *United States* v. *Englander, supra*, 271 F. Supp. at 184-85.

The Government also questions why the Department would have recommended the denial of petitioner's claim for any other reason if, in fact, it was recommending that it be denied on the grounds of insincerity. (Gov't Br. pp. 33-34, n. 17.) The Government overlooks the fact, however, that it was commonplace for the Department to recommend the denial of conscientious objector claims on the basis of several independent grounds. See *United States* v. *Jakobson, supra*; *United States* v. *Owen*, 413 F.2d 383 (8th Cir. 1969); *Kretchet* v. *United States*, 284 F.2d 561 (8th Cir. 1960); *Shepherd* v. *United States*, 217 F.2d 942 (9th Cir. 1954); *United States* v. *Englander, supra*. The more pertinent question is why the Department would question petitioner's sincerity in its advice letter if it did not intend to tender the issue of his insincerity to the board for decision.

It cannot be denied, therefore, that the appeal board may have denied petitioner's conscientious objector claim

because it concluded that he was insincere. But, as we argued in our main brief, there is no basis in fact whatsoever to support such a conclusion (Pet. Br. pp. 39-45). After having had an opportunity to evaluate petitioner's credibility on the basis of his demeanor during his extensive testimony, the Department's own hearing officer concluded that petitioner was completely sincere in his claim. Indeed, he specifically considered and rejected as reflecting adversely on petitioner's sincerity the only two factors which the Government even claims are pertinent to the issue: the lateness in the presentation of the claim and the possibility that financial considerations might have motivated its filing. He was fully satisfied with petitioner's explanation of why he did not file his claim until February, 1966 (see Pet. Br. pp. 40-42), and he obviously believed that the financial sacrifices that petitioner had made because of his beliefs were persuasive evidence of his sincerity (A. 116a-117a, notes 2 and 3). Surely it was error for the Department to advise the appeal board that, on the basis of these factors alone, it could reject the determination of the officer specifically designated by the Department, pursuant to the Act (50 U.S.C. App. §456(j)), to evaluate petitioner's sincerity.[6] *See United States ex rel. Tobias* v. *Laird*, 413 F.2d 936, 940 (4th Cir. 1969); *United States ex rel Eckman* v. *Laird*, 430 F.2d 96, 99 (4th Cir. 1970); *Cohen* v. *Laird*, 315 F. Supp.

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[6] The hearing officer was a retired Kentucky Circuit Court judge with twenty-five years of experience on the trial bench (R.P. Vol. III 281). In addition to being the only person to have had an opportunity to carefully examine petitioner and other witnesses in person, he had before him the voluminous FBI file which included the full reports of all of the interviews (*ibid.* 252, 291). He also relied upon the opinions as to petitioner's sincerity of two individuals with whom he was personally familiar (A. 117a). In contrast, the appeal board was composed of laymen, it had no opportunity to see and hear petitioner or any of his witnesses in person, and it had only the brief resumé of the FBI investigation before it.

1265, 1277 (D.S.C. 1970). This error was compounded by the Department's erroneous legal advice with respect to the weight which these factors might be given by the appeal board. (See Pet. Br., pp. 39, 43-45).

CONCLUSION

For the reasons set forth above and in our main brief, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with instructions to dismiss the indictment.

Respectfully submitted,

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